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No. 87-281

Supreme Court, U.S.
FILED
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 84-5627, No. 84-5770 and No. 84-5946

Henry Crawford, et. al.
Respondents

v.

La Boucherie Bernard et. al.

CA 83-0780

—o—

No. 84-5628, 84-5771, and No. 84-5947

Raymond Donovan, Secretary of
U.S. Department of Labor
Respondent

v.

Bernard H. Goldstein, et. al.
Petitioners

CA 83-0940

—o—

PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

—o—

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41 pp

QUESTIONS PRESENTED

1. Can the United States Court of Appeals confirm a flawed order by a Federal District Court resulting in a confiscation, rather than restitutional offset, of an interest in an ERISA controlled profit sharing plan; resulting in an improper judgment and civil RICO judgment?

2. Why did the District Court ignore the offset recommendations of the Department of Labor (a co-plaintiff) and the Receiver of the plan; resulting in the flawed order?

3. Can the United States Court of Appeals deny consideration of a relevant Supreme Court ruling of June 22,1987 (Agency Holding Corp. v. Malley-Duff Associates), without explanation to the Appellant?

4. Can the United States Court of Appeals nullify the Rule 60 (b) motion, FRCP, of the Appellant by refusing to hear, consider or rule on said motion?

PARTIES TO THE PROCEEDINGS

1. Petitioner: Bernard H. Goldstein owning 64.7% interest in the Plan.

2. Respondents are: (a) Henry Crawford and 14 Plan Participants owning only 25% interest in the Plan c/o William Osborneand James Ray, Attorneys.

(b) Roy Schotland, Receiver, appointed by District Court in April 1983

(c) Raymond Donovan, Secretary, Department of Labor

3. Other potential future respondents (parties in Case No. CA 87-0228 now being appealed to the U.S. Appellate Court:

(a) Robert Dolan and 395-495 Associates

(b) Gary Hurst and Hurst Properties

(c) Madison National Bank

(d) Solicitor General of the United States

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No. _____

IN THE
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No. 84-5627, No. 84-5770 and No. 84-5946

Henry Crawford, et. al.
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Bernard H. Goldstein, et. al.
Petitioners

o

PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

o

Petitioner's Bernard H. Goldstein respectfully asks and suggests that a unit of certicrari issue to review the judgments

and opinions of the U.S. Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 27, 1987, May 21, 1987 and August 5, 1987.

OPINIONS BELOW

A. The basic opinions and orders of the United Court of Appeals include the following:

1. Its 3/27/87 13 page Slip Opinion (Appendix A, also reported in 815 F2d 117 to 123). On pp. 6 and 12 of the Slip Opinion it recognizes the equitable remedy of "offset" in lieu of (but not in addition to) "forriture". (a) on page 13 of Slip Opinion, it is not clear which judgment is affirmed.

(b) This opinion also fails to mention or indicate that it never reviewed or even considered 2 appeals concerning (1) the order 8/3/84 relating to the BRIL Partnership Real Estate (Appendix I or (2) the October 1984 Order (Appendix K) relating to Petitioners 8/29/33 - Rule 60(b) Motion.

2. Its 5/21/87 order (Appendix B) denying Petitioners, Petition for Rehearing and Petitioners Suggestion for Rehearing en banc (Appendix C)

JURISDICTION

1. This litigation was begun in 1983 when the Private Plaintiffs (Crawford et al.) and the Department of Labor (Respondents and Appellees) filed complaints in the U.S. District Court for the District of Columbia against La Boucherie Bernard et. al. and the Goldsteins' (Petitioners and Appellants) under Civil RICO (18 USC §§ 1961) for alleged breach of fiduciary duties. By a series of summary judgment the District Court entered a $997,821.38 judgment against Petitioner Goldstein under ERISA for restitution on 1/20/84; and, on 7/6/86 awarded the Profit Sharing Plan treble damage in the amount of $1,995,642.76 under Civil RICO. (18 USC § 1964)

2. Those judgments along with other Court orders including orders with references to "offsets" and forfitures were appeal to the U.S. Appellate Court for the District of Columbia Circuit under Rules 3 and 4 of the FRAP, and this Petition for Writ of Certiovani is being filed pursuant to 28 USC § 2101 (c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONSTITUTION AMENDMENT NO. 5

"No person shall be ... deprived of ... property without due process of law, nor shall property be taken without due process of law..."

2. ERISA (29 USC 1101)

3. RICO (18 USC 196 4[c])

STATEMENT OF THE CASE

The Statement of the Case as readily expressed by District Court Judge Greene, in his opinion on behalf of the United States Court of Appeals for the District of Columbia Circuit, March 27, 1987, as follows:

" This case presents primarily the question whether, not withstanding the so-called Anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Act authorizes a Court to OFFSET a party's interest in a Plan covered by that statute against a judgment based on the party's breaches of duty to the same plan. For the reasons discussed below, we conclude that ERISA does allow such an OFFSET...

It is the July 6,1984 order that is before us on this appeal and, as noted, the issue here is whether the Court had the power to order such an OFFSET...

The District Court's order in this case to OFFSET the Goldstein's interests in the plan in satisfaction of their judgment debt is fully consistent with these principles...

If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust...will be taken by the court in order to make good the loss...

In short, the OFFSET remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA...

The broad equitable remedies authorized by ERISA against fiduciaries who wrongfully deplete plan assets to the detriment of beneficiaries can best - perhaps only - be effective here by applying the traditional trust remedy of an OFFSET...

For the reasons stated, the judgment of the District Court is

Affirmed."

REASONS FOR GRANTING THE WRIT

The decision rendered by the United States Court of Appeals on March 27,1987, is in direct conflict with their admission that OFFSET had been applied in the determination of the original judgment of $997,821.38, as is evidenced by the following exhibits and explanations thereof.

EXHIBIT "A" - AFFIDAVIT OF BERNARD GOLDSTEIN

This affidavit executed on May 4, 1983, indicates willingness of the Appellant to co-operate and effect a speedy settlement of the case. Item 7 states that the Plan owned 49% of BRIL Associates. There was no dispute to this or any of the other facts stated, yet the Appellate decision on p. 4 & 3, interpreted this as a loan, not as an investment.

EXHIBIT "B" - CONSENT ORDER

This order of May 19, 1983, specifically states that "The plan will, beginning July 1,1983, pay interest monthly to Madison National Bank...

Madison shall not undertake any action to foreclose on the Shell Oil Park property before June 1, 1985. The Receiver, however, in spite of this order defaulted on the monthly payments beginning in October, 1984, resulting in a foreclosure in February, 1985. This action took place without the written consent of the District Court.

EXHIBIT "C" - ORDER OF SEPTEMBER 29, 1983

This order established an equitable trust on the BRIL property; this action having been compatible with the affidavit of Bernard Goldstein, Item 15, EXHIBIT "A".

EXHIBIT "D" - SECRETARY OF LABOR RESPONSE

This motion by the Secretary of Labor (coplantiff) points out legal errors made by the District Court in awarding fees to the plaintiff attorneys.

EXHIBIT "E" - MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum submitted by plaintiff attorneys, further qualifies the use of OFFSET that should have been applied by the District Court in their orders of both January 20, 1984 and July 6, 1984.

EXHIBIT "F" - Page FROM SECRETARY OF LABOR's BRIEF TO THE APPELLATE COURT

This page fully explains the position of the co-plaintiff, the Department of Labor.

EXHIBIT "G" - PRIVATE PLAINTIFF OPPOSITION

This statement by the co-plaintiff again refers to OFFSET, which was not applied by the District Court.

EXHIBIT "H" - NOTICE OF FILING BY DEPARTMENT OF LABOR

An examination of this submission by the Department of Labor at the request of the District Court further establishes the principle of OFFSET that was ignored by the District Court.

EXHIBIT "J" - COMMENTS BY DEFENDANT, ACCOUNTANT's REPORT OF PLAN, DISTRICT COURT ORDER OF APRIL 22, 1987, ERRONEOUS RETURN OF DOCUMENT FROM DISTRICT COURT AND REPLY TO COURT's ERROR, MOTION FROM BERNARD GOLDSTEIN IN A RELATED CASE.

These various documents are self-explanatory and reflect the bias and prejudice of the District Court against the defendant.

EXHIBIT "K" - LETTER FROM ROY A. SCHOTLAND, RECEIVER FOR THE PLAN, TO JUDGE T.P. JACKSON.

This letter from the Receiver acknowledges in Item (e) the existence of the interests of the Goldstein's in the plan and the application of those interests in OFFSETTING judgment liability.

EXHIBIT "L" - MOTION OF PLAINTIFF

MAY 21, 1987

This motion by Goldstein in a related case explains the facts relevant to the BRIL property and its consequent mishandling by the Court appointed Receiver.

EXHIBIT "M" - SECRETARY OF LABOR MOTION IN A RELATED CASE.

Page 2 illustrates the misunderstanding of the actions of the District Court by the Secretary of Labor. In addition, the appraised value of the Bril property was never considered by the Court when it established the January 20, 1984 judgment of $997,821. against the Goldsteins.

EXHIBIT "N" - SUPPLEMENTAL MOTION FOR REHEARING EN BANC

This motion was rejected by the United States Court of Appeals, in spite of the inclusion and explanation of the facts that were relevant to the June 22, 1987 ruling of the United States Supreme Court. (Agency Holding Corp v. Malley-Duff Associates)

CONCLUSION

Based on the interpretation of the Depart-- ment of Labor memo in Exhibit "F" and the inclusion of the appraised value of the BRIL property as of January, 1984, the total projected value of the Plan at the time of the District Court's order of January 20, 1984, would have been:

RECEIVER'S PROJECTION OF ASSETS INCLUDING THE JANUARY 20, 1984 JUDGMENT	$1,377,765.
APPRAISED VALUE OF BRIL PROPERTY	1,000,000.
GROSS VALUE OF PLAN	2,377,765
LESS: AMOUNT DUE MADISON BANK ON MORTGAGE	(498,000)
NET VALUE OF PLAN	1,879,765
GOLDSTEIN INTEREST (63.961%)	1,202.316

If the true value of the Goldstein interests were $1,202,316. and the amount due the Plan was $977,821, as determined by the Department of Labor, then the Goldsteins were entitled to receive $204,495, subject to the sale of the BRIL property. How did both the District Court and the United States Court of Appeals overlook these pertinent facts and allow both a flawed judgment to exist and a subsequent RICO judgment?

The failure of the United States Court of Appeals to consider the United States Supreme Court ruling in the Agency Holding Corp. v. Malley-Duff Associates remains unanswered.

For the foregoing reasons and the enclosed exhibits, which will further substantiate the facts that OFFSET was not applied by the District Court and obviously overlooked by the United States Court of Appeals, the petition for Certiorari should be granted.

WHEREFORE, Petitioner requests the Supreme Court of The United States to grant this petition for writ of certiorari and for all other just and proper relief.

Respectfully submitted,

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5627

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5628

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

HENRY CRAWFORD, et al., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 84-5770

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5771

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

No. 84-5946

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5947

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR, et al.

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-00780 and 83-00940)

Argued January 17, 1986

Decided March 27, 1987

Daniel B. Blake, III for appellants in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

William W. Osborne, Jr., with whom *Jonathan G. Axelrod* and *James S. Ray* were on the brief for appellees, Crawford, et al. in Nos. 84-5627, 84-5628, 84-5946 and 84-5947.

Ellen L. Beard, Attorney, Department of Labor, with whom *Thomas L. Holtzman*, Attorney, Department of Labor was on the brief for appellee, Secretary of Labor in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

Before: MIKVA and BORK, and HAROLD H. GREENE,* *District Judge.*

Opinion for the Court filed by *District Judge* GREENE.

GREENE, *District Judge*: This case presents primarily the question whether, notwithstanding the so-called anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Act authorizes a court to offset a party's interest in a plan covered by that statute against a judgment based on the party's breaches of duty to the same plan. For the reasons discussed below, we conclude that ERISA does allow such an offset.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

I

Appellant Bernard Goldstein, defendant below, was chief executive officer and majority owner of two corporations, La Boucherie Bernard, Ltd., and District Hotel Supply, Inc. Bernard Goldstein was also a participant in and trustee of a profit-sharing plan established for the corporation's employees, the District Hotel Supply, Inc., Profit Sharing Plan. Appellant Jack Goldstein, Bernard's brother, also a defendant below, was an employee of both corporations and a participant and trustee of the Plan.

In 1978, Bernard Goldstein, along with his wife and two children, established a partnership called BRIL Associates for the purpose of purchasing real estate in Virginia on which to build a new company headquarters. On December 14 of that year, BRIL bought real estate in Fairfax County, Virginia, from the Shell Oil Company, the purchase being financed by a first mortgage from Madison National Bank and a second mortgage from Shell Oil.

During the next three years a series of transactions occurred involving the Goldsteins' profit sharing plan and the BRIL property in Fairfax. Details aside, the Goldsteins ultimately transferred some $461,000 in Plan assets to BRIL or for BRIL's benefit. The Goldsteins never repaid this money to the Plan; they made nc agreement to repay the money; and they made no provision to pay interest on the amount so "borrowed."

Between May 1980 and June 1982, the Goldsteins also transferred $163,000 from the Plan to La Boucherie Bernard, a corporation that was predominantly owned by Bernard Goldstein and that was also a Plan sponsor. Additionally, they used Plan assets within that same time period to satisfy a tax obligation of La Boucherie Bernard; declared a contribution to the Plan which was never paid; and engaged in other transactions in violation of their fiduciary duties under ERISA.

Suit was brought by fifteen participants in the Plan,[1] including appellee Crawford, and on January 20, 1984, the District Court granted summary judgment in favor of the Plan against the Goldsteins, upon a finding that the latter had breached their fiduciary duties as Trustees of the Plan and had violated ERISA's prohibited transactions provisions by misusing Plan assets for their own benefit and that of others. *See* ERISA §§ 404(a)(1)(A), (B), and (C), 406(a)(1)(D), and 406(b)(1) and (2), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (C), 1106(a)(1)(D), and 1106(b)(1) and (2) (1982).

The judgment thus entered against Bernard and Jack Goldstein jointly and severally was for $976,822.38, and the judgment against Bernard Goldstein alone for $20,999. On July 6, 1984, when the Goldsteins had failed to pay any of the judgments, the court granted the motion of the Plan participants for equitable enforcement of these judgments, and it ordered the Goldsteins' own beneficial interests in the Plan to be offset and applied to their judgment debts. It is the July 6, 1984 order that is before us on this appeal and, as noted, the issue[2]

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[1] These Plan participants were employees or former employees of Boucherie Bernard.

[2] The Goldsteins also argue somewhat mysteriously that the order was a confiscation of their property in violation of the Fifth Amendment to the United States Constitution, but no authority is cited for this proposition, and it entirely lacks merit. Moreover, since the Goldsteins did not file a timely notice of appeal from the underlying ERISA judgment, we lack jurisdiction to review the merits of the breach of duty issues and will consider only the issue of offset. The District Court's order granting summary judgment to plaintiffs under ERISA, and certifying that judgment as final under Fed. R. Civ. P. 54(b), was issued on January 20, 1984. The corollary judgment was entered on the court's docket sheet on April 10, 1984. The first notice of appeal was not filed until September 4, 1984, nearly five months later.

Under Fed. R. App. P. 4(a)(1) and 28 U.S.C. § 2107, the notice of appeal in a civil case such as this must be filed

here is whether the court had the power to order such an offset.

II

ERISA is a comprehensive remedial statute enacted to:

> protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

Under section 409(a) of the Act, 29 U.S.C. § 1109(a), a person who breaches his fiduciary duties to a pension plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Section 502(a) of the statute, 29 U.S.C. § 1132(a), in turn authorizes the Secretary of Labor and any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section [409]" or to obtain an injunction or "other appropriate equitable relief" to redress a fiduciary violation.

As may be deduced from this language, where a party has breached his fiduciary duty, the courts have broad authority under the statute to fashion remedies for re-

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within 60 days after entry of the judgment or order appealed from. While the District Court may extend this filing time for up to 30 days, the Goldsteins never moved for an extension of time, and their notice of appeal was thus late by almost three months. *See Browder* v. *Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Moorer* v. *Griffin*, 575 F.2d 87 (6th Cir. 1978). Finally, it is clear that, contrary to the Goldsteins' argument, the ERISA judgments were not interlocutory but final since, as the Goldsteins concede in their brief (at 13), the District Court entered final judgment under Rule 54(b).

dressing any breach and for protecting the interests of participants and beneficiaries. *See, e.g., Donovan* v. *Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983) (upholding order requiring appellants to post $1 million bond). The legislative history of section 409(a) further underlines what is apparent from the statutory language. Thus, the Report of the Senate Committee on Labor and Public Welfare states that:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . *The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts* . . . .

S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4871 (emphasis added). Similarly, Senator Harrison A. Williams, Chairman of the Committee, made clear the congressional direction to the federal courts to draw on principles of traditional trust law, stating that:

> The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. S-15737, Aug. 22, 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5186; *see also Eaves* v. *Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust. *Id.*

The District Court's order in this case to offset the Goldsteins' interests in the Plan in satisfaction of their

judgment debt is fully consistent with these principles. When plaintiffs requested such an order, their final judgment against the Goldsteins had already remained unpaid after some six months. In the absence of an offset order, the Receiver of the Plan might well have been obligated to include the Goldsteins in a distribution of Plan assets to all eligible participants, in accordance with the governing Plan documents.[3] Since the Goldsteins held more than sixty per cent of the beneficial interest in the Plan, such a distribution would in effect have further rewarded them for their wrongdoing, and innocent Plan beneficiaries would still not have received their due.

Rather than to allow such an inequity, traditional trust law would clearly support the forfeiture of the beneficial interest of a breaching fiduciary in order to offset the losses suffered by the trust. As one authority on trusts states:

> If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust . . . will be taken by the court in order to make good the loss.

Bogert, *Trusts and Trustees* § 191, at 484 (2d ed. 1979). Professor Scott has reached the same conclusion, stating that:

> [i]f the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee-beneficiary

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[3] Such a distribution might have been called for, for example, if the corporate assets had been sold to another corporation. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), requires a fiduciary to act in accordance with the documents and instruments governing the plan to the extent that they are consistent with the provisions of the Act.

> is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. The other beneficiaries can insist that his interest be impounded to make good the loss; they are entitled to a charge upon his interest to indemnify them for the loss.

III *Scott on Trusts* § 257, at 2201 (3d ed. 1967).

In short, the offset remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA.

III

The Goldsteins argue, however, that ERISA's anti-alienation provision calls for a different result. This provision, section 206(d)(1) of the Act, 29 U.S.C. § 1056 (d)(1), mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Moreover, an identical provision in section 401(a)(13) of the Internal Revenue Code of 1954, 26 U.S.C. § 401(a)(13), has been interpreted by the Treasury Department to prohibit not only voluntary assignment and alienation, but also attachment, garnishment, or levy by operation of law. 26 C.F.R. § 1.401(a)-13(b)(1). Indeed, the Secretary of Labor has recognized that most courts have construed section 206(d)(1) to prohibit the garnishment of pension benefits by creditors, and that the legislative history of the statute supports that interpretation. *See, e.g., General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980) (section 206(d)(1) includes "all encroachments, both voluntary and involuntary").

The anti-alienation rule has not been regarded as immutable, however. For example, various decisions have implied a limited exception to permit the garnishment of plan benefits in order to satisfy family support and

community property obligations contained in divorced decrees. *See, e.g., American Telephone & Telegraph Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979), and *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union, Pacific District—Pacific Maritime Association Pension Plan* v. *Stone*, 453 U.S. 922 (1981).[4]

Similarly, the garnishment of an employee's pension fund interest has been permitted to satisfy liabilities arising from his criminal misconduct toward his employer. *St. Paul Fire and Marine Insurance Co.* v. *Cox*, 752 F.2d 550 (11th Cir. 1985). In that case, the Eleventh Circuit expressly rejected an argument that, since the anti-alienation provision of ERISA prevented assignment of plan funds to individual claimants, they also prevented the fund from garnishing defendant's interest. Said the court: "[t]here is no reason to conclude that ERISA requires the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds," and that "[o]f prime importance to the courts in considering implied exceptions to the non-alienation provisions have been the congressional objectives behind ERISA, and the effect of the proposed exceptions on those goals." *Id.* at 552 (citing *American Telephone & Telegraph* v. *Merry, supra*, 592 F.2d at 120-25; *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1154-56 (S.D.N.Y. 1978)).

We agree with the Eleventh Circuit. ERISA was established to protect "the continued well-being and security of millions of employees and their dependents" by providing "minimum standards . . . assuring the equi-

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[4] Further, a participant or beneficiary may make voluntary and revocable assignments, totaling not more than ten per cent of future benefit payments, once benefits are in "pay status" and provided that the voluntary assignment is not intended to defray plan costs; and benefits may be pledged as collateral to secure loans from the plan, if the plan so permits. R. Osgood, *The Law of Pensions and Profit Sharing* § 1.9.4 (1984).

table character of [pension fund] plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). Given the fundamental congressional purpose to have the courts apply trust principles to disputes such as this, and given that the law of trusts is grounded in a strong equitable policy not to permit a trustee to benefit from his own breaches, we have no difficulty in concluding that the anti-alienation portion of the statute does not stand in the way of the remedy adopted here. A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect. Under such a construction, the Goldsteins, who repeatedly and indeed blatantly breached their fiduciary duties to the pension plan they created, would be allowed to evade their court-ordered responsibility to make restitution for the money they wrongfully obtained, and Plan members and their families would have to watch their pension monies once again disappear into the Goldsteins' pockets.

The Goldsteins argue that to allow an offset under the circumstances of this case would frustrate the protective purposes of ERISA's anti-alienation rule.[5] In the first place, an offset here creates no risk of interference with ongoing Plan operations, since the Plan will cease operating in any event. Moreover, the Goldsteins will not be unfairly deprived of anticipated retirement benefits, since the offset operates as if they were receiving the full amount of benefits they would have received had the Plan had not been depleted by their wrongdoing.[6] Finally, as indicated, the purpose of ERISA's anti-alienation provision—to protect plan beneficiaries by ensuring that plan asests are used only for payment of benefits—would be undermined, not advanced, by an interpretation that pro-

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[5] The purpose of that provision is "to protect a person and those dependent on him from the claim of creditors." *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978).

[6] The amount is merely credited against their judgment debt to the Plan.

hibited offset under these circumstances. The broad equitable remedies authorized by ERISA against fiduciaries who wrongfully deplete plan assets to the detriment of beneficiaries can best—perhaps only—be effectuated here by applying the traditional trust remedy of an offset.

IV

On July 6, 1984, the District Court granted summary judgment in favor of the Profit Sharing Plan, under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961 *et seq.* (1982), and awarded the Plan treble damages against Bernard Goldstein in the amount of $1,995,642.76. Appellant Bernard Goldstein's challenge to this RICO judgment can be disposed of briefly.

First. Appellant argues that he may not be found liable in a civil RICO action without a prior criminal conviction and a separate racketeering injury (other than an injury flowing from the predicate acts). Suffice it to say that appellant's theory was rejected by the Supreme Court's recent decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985).[7]

Second. Appellant contends next that the District Court erred by applying findings of fact made under

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[7] The *Sedima* court said that it could:

> find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

Id. at ——; 105 S. Ct. at 3284. Similarly, the *Sedima* court held that there is no requirement that a private plaintiff establish a distinct "racketeering injury". *Id.* at ——, 105 S. Ct. at 3285.

ERISA to the RICO claim, one that thus arose under a different statute. The foundation for this argument is difficult at best to make out, and even more difficult to accept. Bernard Goldstein admitted to making transfers of Plan assets with full knowledge that those transfers were illegal. Such an admission supports not only a finding of a violation of ERISA duties but also a violation of 18 U.S.C. § 664, the statutory predicate for appellant's RICO violation.[8] That statute prohibits "an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments." The same facts underlie both claims, and the same findings of fact may be applied to both.

Third. Appellant also argues that summary judgment was improperly granted because he was denied a jury trial on the issue of intent. This argument is equally meritless. Although state of mind is usually a question for the jury, this does not preclude a court from finding intent, on summary judgment, where that intent "may be inferred from objective facts." *See, e.g., Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Fourth, appellant challenges the District Court's determination of liability, which included a trebling of damages, to over $1.9 million, pursuant to RICO. Appellant asserts that, in fact, he owes only $50,000, and he claims that an award above that amount constituted an abuse of discretion. No support or justification whatever are offered for this bare conclusory statement. In sum, the District Court's application of RICO was proper in all respects.

For the reasons stated, the judgment of the District Court is

Affirmed.

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[8] RICO, at 18 U.S.C. § 1961(1), defines "racketeering activity" as the commission of one of 41 federal and state crimes, including embezzlement from pension and welfare funds under 18 U.S.C. § 664.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMIBA CIRCUIT

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No. 84-5627 September Term, 19
CA No. 83-00780

Henry Crawford, et. al.

v.

La Boucherie Bernard Ltd., et. al.

United States Court of Appeals
For The District of Columbia Circuit
FILED MAY 21 1987
GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 84-5628
84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: MIKVA and BORK, Circuit Judges; HAROLD GREENE*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Upon consideration of petitioners' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

PER CURIAM
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

* Sitting by designation purusant to 28 U.S.C. Section 292(a).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19 86
CA No. 83-00780

NO. 84-5627

United States Court of Appeals
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FILED MAY 21 1987

GEORGE A. FISHER
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Henry Crawford, et. al.

v.

La Boucherie Bernard Ltd., et. al.

And Consolidated Case Nos. 84-5628, 84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; Harold Greene*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Petitioners' suggestion for rehearing en banc has been transmited to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

PER CURIAM,

FOR THE COURT;
GEORGE A. FISHER, CLERK

Appendix C

BY: /s/
Robert A. Bonner
Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 292(a).
Chief Judge Wald did not participate in this order.

ATTACHMENT NO. 16

PARALLEL TABLES BETWEEN DEPOSITION PAGES AND CORRESPONDING PAGES IN THE JOINT APPENDIX VOL. III

1. Pages 89-90 para. 16, Vol. 1 of Appendix say: illegality of:

a) "Goldstein admitted the knowledge and understanding of the his investments of Plan assets through BRIL in purchase of Shell Property."

b) References in depositions to support this statement appear on page 89, Vol. 1, para. 16, which are:

Goldstein Deposition I	Location in Joint Appendix
p. 106-10	p. 1013-1017, pg. 1014 line 14-19
p. 116-17	p. 1018 & 984
p. 135-36	p. 1036-1037
p. 139-40	p. 1040-1041
p. 143-44	p. 1044-1045
Goldstein Deposition II	
p. 29-48	p. 1308-1326
p. 82- (83)	p. 1359-(1360)
p. 84-86	p. 1361-1363
p. 89-97	p. 1366-1374

c) A careful examination of the references in (b) above (at the right margin, will show they do not support item 1(a) above on pp. 89-90 para. 16 in Vol. 1 of Appendix.)

2. The same criticism can be made of Para. 14 on pg. 89 of Vol. 1 of J.A. See page 16 of the Memorandum of Points and Authorities above.

3. See & Compare para. 21 of pg. 90 of Vol. 1 of J.A.